89-184

In The

Supreme Court of the United States

October Term, 1989

J. WILLIAM COSTELLO PROFIT SHARING TRUST,

Petitioner,

vs.

STATE ROADS COMMISSION OF THE STATE HIGHWAY ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED

1. Did the Maryland Court of Appeals in upholding the Circuit Court's ruling to exclude a sales contract for the same property being condemned, deprive the property owner of its due process and equal protection rights?

2. Was the action of the State Highway Administration, in refusing to review a site plan for the property, on its merits, by stating that they will be condemning the property in the future and requesting that the reviewing agency take no action on the site plan application or taking of property without just compensation?

PARTIES TO THE PROCEEDING

The parties to this proceeding are J. William Costello Profit Sharing Trust, defendant below and State Roads Commission of the State Highway Administration, a plaintiff below.

The following were also parties to the proceeding below: Prince George's County, Maryland and the Washington Suburban Sanitary Commission They were named as defendants only for the purpose of assuring that all taxes and benefit assessments were to be paid out of any proceeds of the condemnation.

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No.

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J. WILLIAM COSTELLO PROFIT SHARING TRUST,

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vs.

STATE ROADS COMMISSION OF THE STATE HIGHWAY ADMINISTRATION,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner J. William Costello Profit Sharing Trust ("Trust") respectfully prays that a writ of certiorari issue to review a decision of the Court of Appeals of Maryland entered in this petition on May 1, 1989, which is included in the Appendix attached hereto.

OPINIONS BELOW

The order of the Court of Appeals of Maryland and the order of the Court of Special Appeals of Maryland appear in the Appendix attached hereto. The inquisition of the Circuit Court is not reported.

STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1257(3), 2101(c) and under Rule 17(b), and (c), on the grounds that the Court of Appeals of Maryland, as the court of last resort, had by its order of May 1, 1989 allowed the State to act in its review status on site plans for development. Their ability to recommend denial of all site plans for property which is in the State's program to be acquired, whether for roads or other public facilities, can cause a reduction in value and thus deprive the property owner of just compensation, due process and equal protection of the laws. This presents an important federal question, directly addressed in the Constitution, where a state attempts to not pay fair value for property, to its own pecuniary benefit and to the detriment of a citizen of the United States. This principle is in direct conflict with decisions of the State of Maryland and previous federal decisions.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition is based upon the due process and just compensation requirements of the Fifth Amendment to the United States Constitution and on the just compensation, due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Procedural Background

This action was commenced by the State Roads Commission of the State Highway Administration ("SRC") to condemn a parcel of property owned by the Trust.

During the trial, the Trust attempted to introduce evidence of a sales contract for the property as evidence of value, but the trial court refused to allow its introduction. The jury returned with a verdict far below the sales price in the contract.

The Court of Special Appeals, heard argument on April 13, 1987 and issued an opinion and order May 11, 1987 affirming the trial court. The Court of Appeals heard argument on January 4, 1988 and on May 1, 1989 issued its opinion, also upholding the trial court decision.

B. Factual Background

The central factual position of the petitioner is that the sales contract should have been admitted into evidence. The contract was contingent on the purchaser obtaining an approved site plan for the property. There were two other contingencies in the contract which are not material because the site plan is the first issue to be settled. Application for a site plan approval was filed with the appropriate authorities for Prince George's County, Maryland. As is the usual procedure, copies of the site plan, showing a 3,000 square foot office building and parking, was referred to various governmental agencies for comment including the SRC. The SRC's reply was to the effect that since they plan to acquire the subject property, they will not give forth comment and they request that the planning authorities not approve any plan for the property. This letter was dated June, 1983 and the taking was not filed

until May, 1985. Because the SRC gave a negative comment, the testimony of the planning agency to review and approve the site plan was that they would not approve the site plan under any circumstances.

The prospective purchaser then cancelled the contract and did not pursue the further approval as needed.

Under these facts the trial court refused to allow the contract into evidence or allow the prospective purchaser to testify.

REASONS FOR GRANTING THE WRIT

This case presents the question of whether a condemning agency can actively affect the development rights and thus the value of the property when they have already announced their intention to acquire the property for a public use.

The action of the sovereign (the State) in the planning process can and does have a direct effect on the value it pays for property. If the opinion of the Court of Appeals is allowed to stand, the State will play a direct role in the valuation and compensation of property it will acquire.

The issue is directly related to the underlying issue of condemnation blight. In prior times, the State was more obvious, by allowing property to deteriorate and become overgrown, a jury would not get the same impression if it saw the property in its prior pristine condition.

The State had become more sophisticated, particularly regarding unimproved land. Originally, the State, along with the local zoning authority, simply withheld zoning from land it wanted to acquire. That practice was struck down in *Freeman v. SRC*, 252 Md. 319, 310 A.2d 555 (1963) and *Hoyent v. Prince George's*

County, 262 Md. 667, 278 A.2d 588 (1981). Then the State started using the reservation process to delay development. That was struck down on the Court of Appeals in *MNCPPC v. Chadwick*, 286 Md. 1, 405 A.2d 241 (1979). These were all direct attacks on the value of property, purposely to depress the value of property to be taken.

In this case, the State is not directly stopping the improvement of property, it is acting in an advisory role. But, the net result of that role is causing the prospective purchaser to back out of the contract which therefore is not admissible in court as evidence of value. If the process were allowed to continue to obtain approval of the site plan, then the jury would be allowed to see what a willing buyer would pay for the exact property.

It is critical that the State not interfere to depress property values where it will be acquiring the subject property.

In our complicated world, even the most rural of areas now have sophisticated zoning ordinances requiring many levels of approvals. Government intrudes itself in the process and the possibility of abuse is very evident. When condemnation is also a distinct possibility, the State should take great steps to avoid affecting the realization of just compensation. In this case the State has used its powers to depress the value of its taking.

The federal question is whether the State may make use of its powers in advising on plans in the approval process so as to depress the value knowing it will be seeking to acquire the property. The actions have a direct effect on the constitutional provisions that the State must pay just compensation for what it acquires by eminent domain.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID D. FREISHTAT
SHULMAN, ROGERS,
GANDAL, PORDY
& ECKER, P.A.
Attorneys for Petitioner

Dated: July 27, 1989

APPENDIX A — OPINION OF THE COURT OF APPEALS OF MARYLAND FILED MAY 1, 1989

IN THE COURT OF APPEALS OF MARYLAND

NO. 101

September Term, 1987

J. WILLIAM COSTELLO PROFIT SHARING TRUST

v.

STATE ROADS COMMISSION OF THE STATE HIGHWAY ADMINISTRATION

Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Smith (retired, specially assigned)
Orth (retired, specially assigned)
JJ.

Opinion by Cole, J.

Filed: May 1, 1989

In this condemnation case, we shall decide whether a trial judge correctly excluded an executory, contingent land sales contract from the jury's consideration in determining the award.

Dr. William Costello acquired a 37.5 acre tract in Prince George's County in 1971 which he planned to develop for both

residential and commercial uses. The property was zoned residential urban (RU) which is a comprehensive design zone requiring a three stage process to bring it to development. The first step involves a zoning map amendment. The second step requires a comprehensive design plan and a preliminary plat of the subdivision to be approved by the Maryland-National Capital Park and Planning Commission (PPC). The final step requires that the PPC approve, for each of the uses on the property, a specific design plan.

In this case, the zoning map amendment was adopted in 1975 by District Council Resolution CR 108-1975. Thirty-seven acres were set aside for the building of townhouses, and the balance, a little less than half an acre, was set aside for convenience commercial use, with a proviso that only a 3,000 square foot building could be constructed thereon.

Development of the property, however, was subjected to even further restrictions and contingencies. Costello entered into a covenant with the City of Bowie, agreeing that any building on the convenience commercial site would be visually screened from the roadway by an opaque fence or heavy plant screen, and that no sign could be erected without the city's written authorization. In addition, Costello encumbered the property by agreeing that no commercial development could proceed without the consent of Artery Organization, Inc., a neighboring landowner.

Costello then entered into a contingent contract for the sale of the tract of land to Woodbridge Construction Company, Inc., for a $100,000 sales price. The agreement contemplated a commercial office facility of not less than 6,000 square feet, and contained three basic contingencies, to wit, (1) the property needed to be, in some fashion, rezoned to permit the commercial office

facility envisioned by the contract; (2) Artery had to consent to any construction; and (3) 11,000 square feet of land needed to be acquired and dedicated for a public street to serve the convenience commercial site. Failure of any of these contingencies entitled Woodbridge to terminate the agreement.

After the City of Bowie refused to recommend Costello and Woodbridge's request for a 6,000 square foot commercial office building, the parties amended their contract, reducing the square footage to 3,000 and the purchase price to $75,000, and requiring that the purchaser obtain specific design approval and the seller obtain Artery's consent.

On June 9, 1983, the parties submitted a specific design plan to the PPC. The State Roads Commission of the State Highway Administration (the "State") indicated to the PPC its intention to acquire the parcel and asked that the specific design plan be denied. By letter dated November 10, 1983, Costello withdrew without comment the request for specific design approval.[1]

On May 16, 1985, the State filed in the Circuit Court for Prince George's County a condemnation petition against the predecessor to petitioner, Robert D. Costello Associates, Inc., Profit Sharing Trust ("Costello")[2], to condemn the subject property for reconstruction of the Route 50/197 Interchange. The State deposited with the court a check in the amount of $34,850.00, claiming that sum represented the fair market value of the

---

1. While the second step in the three phrase process was approved in 1979, approval for the third step has yet to be obtained.

2. By deed dated December 12, 1983, Robert D. Costello Associates, In ., Profit Sharing Trust conveyed the property which is the subject of this suit to William Costello, M.D., P.A., Profit Sharing Trust.

condemned property. In an answer filed on June 14, 1985, Costello admitted the necessity of the taking but denied that the escrowed amount represented the property's fair market value.

The Honorable Albert T. Blackwell, Jr., now a member of this Court, presided over a jury trial in the Circuit Court for Prince George's County at which two real estate appraisers testified on behalf of the State and two witnesses testified for Costello as to the property's value. Mr. Melville Peters testified on behalf of the State that six comparable commercial properties in the area had been sold for $4.03 per square foot, which would amount to $76,232.00 for the subject property. However, because he perceived numerous limitations on the commercial use of the condemned property, Peters appraised it to be worth $2.00 per square foot, or a total of $36,116.00. Charles E. McLane, Sr., the State's second appraiser, valued the property at $35,000.00 based on sales of residential townhouses in the area.

Dr. William Costello, petitioner's trustee and principal beneficiary, testified on behalf of the petitioner. Through his testimony, petitioner attempted to introduce the 1983 sales contract for the condemned property, which as amended provided for a $75,000.00 sales price. The court refused to admit the terms of the agreement into evidence because the contract's several contingencies were never satisfied. As noted, the contract called for the construction of a commercial office facility which was not a permitted use under existing zoning. Nonetheless, Dr. Costello testified that in his opinion the property was worth $90,000 on the date of the taking. Petitioner also called to testify an independent appraiser, Richard Pierce, who opined a value of $85,761.00.

Appendix A

The matter was submitted to the jury, which awarded Costello $45,000.00. The Court of Special Appeals affirmed the judgment of the court in an unreported opinion. We granted Costello's petition for certiorari to review a single issue: Is it contrary to the public policy requiring just compensation to exclude an unconsummated land sales contract from evidence in a condemnation proceeding?

Costello argues that the trial court erred in denying the admission of the contract of sale for the property as evidence of its fair market value. The State counters that the trial court did not err in refusing to admit the contract because it was so conditional that it was more akin to an option contract than a binding contract. This distinction is crucial. "[I]n a condemnation case, . . . an offer to purchase real property is not admissible to prove its value." *State Roads Comm. v. Kuenne,* 240 Md. 232, 235, 213 A.2d 567 (1965). Unlike consummated and binding contracts, offers are inadmissible to prove the value of land because "the value of an offer depends on too many considerations to allow it to be used as a test of the worth of property." *Horner v. Beasley,* 105 Md. 193, 197, 65 A. 820 (1907), quoted in *State Roads Comm. v. Wyvill,* 244 Md. 163, 172, 223 A.2d 146 (1966). The same reasoning ordinarily militates against the admissibility of option contracts. *See Wyvill,* 244 Md. at 178.

In *Wyvill,* this Court considered the admissibility of executory (i.e., unconsummated) contracts of sale for properties comparable to the condemned real estate. We stated:

> The reasons for the admissibility of prior contracts made by the owner of the condemned property may well be applicable in considering the question of the admissibility of contracts of sale

> for comparable properties. The chances of fraud seem to be no greater; two strangers to the condemnation litigation are involved instead of one. It is true that as to a prior contract for the sale of the condemned land the owner is generally on the stand, subject to cross examination, but the way is always open to opposing counsel to attack the bona fides of contracts as to comparable lands. Modern pre-trial discovery procedure, properly used, affords opportunity for the investigation of any such contracts which will be offered in evidence. *Unlike offers and options, contracts for the purchase of land are binding obligations, not lightly ignored; the fact the contracts have not progressed into sales seems to go to the weight of the evidence rather than to its sufficiency.*

244 Md. at 178. [Emphasis added]. Accordingly, the *Wyvill* court held that evidence of a contract on comparable property was admissible to test an expert's valuation on cross-examination. Moreover, once admitted on cross-examination, subsequent witnesses for the property owner could refer to the contract as the basis for their opinions. 244 Md. at 179-80.

In *Wolff v. Commonwealth of Puerto Rico*, 341 F.2d 945 (1st Cir. 1965), the property owner contended that the trial court erred when it excluded evidence that prior to condemnation the property had been contracted to be sold at a high price conditioned upon obtaining a new zoning classification. The Commonwealth argued in opposition that the contingency on the contract rendered it an option and, therefore, inadmissible as proof of the property's

value. The First Circuit ruled the contract admissible and explained:

> When there is a possibility or probability that the zoning restriction may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value. It follows from the foregoing that such possible change in the zoning regulations must not be remote or speculative. Nichols on *Eminent Domain*, 3rd ed., Vol. 4, § 12.322, pp. 238-243.

Id at 946-7.

Costello emphasizes that under *Wyvill*, the contingencies in the unconsummated land sales contract affect only the *weight* of the evidence but not its admissibility. The petitioner also points out that the value of the land per the contract is reliable evidence because the price was determined in arms-length dealings long before the issue of condemnation arose. Costello suggests that the court should have let the jury determine as a question of fact whether the contingencies would have been met.

Costello's representation of our holding in *Wyvill* is misleading. In that opinion we cited a number of cases holding "that the price fixed in an unconsummated contract of sale entered into before the condemnation by the owner of the condemned property with a third person is admissible as substantive evidence of the value of the property." Quoting *United States v. Certain Parcels of Land Etc.*, 144 F.2d 626, 630 (3d Cir. 1944) we summarized the rationale of those cases:

Appendix A

> It is true that the contract had not been consummated and that, as argued by the government, reception of such evidence makes it possible for a land-owner, learning that condemnation of his property is likely, to enter into a collusive agreement of sale so as to manufacture evidence in support of an exorbitant claim . . . . Yet evidence of a bona fide sale, *otherwise relevant*, should not be excluded because of the possibility [of collusion]. Such objections go to the weight of such evidence rather than to its admissibility . . . . [Emphasis added].

244 Md. at 177.

The key feature distinguishing the case at bar from *Wyvill* is that the highly contingent nature of Costello's unconsummated contract, and the absence of evidence that those contingencies could be fulfilled, deprives it of the relevance that characterized the unconsummated contract in *Wyvill*. Costello's arguments fail to persuade us otherwise.

Specifically, Costello contends that the contingencies should only affect the weight of the evidence to be assigned by the jury, this being "the clear rule of *Wyvill*." We disagree that *Wyvill* stands for any such proposition. Rather than addressing the evidentiary validity of a contingency-laden executory contract, the *Wyvill* Court considered a non-contingent executory contract. Consequently, its reference to the unconsummated nature of a contract bearing on sufficiency and not admissibility was based upon the possibility of collusion inherent in an *executory* contract, and not on any consideration of a contract's *contingent* nature. Indeed, the *Wyvill* Court, quoting *Brush Hill Development, Inc.*

v. Commonwealth, 338 Mass. 359, 155 N.E.2d 170 (1959), drew a sharp distinction between "binding [yet executory] agreements of purchase and sale . . . [and] options, or *contracts based upon so many contingencies as to be meaningless on the issue of fair market value.*" 244 Md. at 175. (Emphasis added). That statement foreshadowed our holding today that the latter category of contracts may lack relevance in a condemnation case. In sum, the *Wyvill* Court merely held that it should be the function of a jury to determine whether collusion provided the impetus for creation of an unconsummated contract.

On the other hand, a jury's function does not encompass determining matters of evidentiary relevance. Rather, such decisions reside within the trial judge's sound discretion. As we see it, determining whether the contingent contract stood a reasonable probability of becoming non-contingent, and thus probative of the property's value, bore upon the relevance of the proposed evidence, and was properly decided by the trial judge.

—

While holding that the trial court did not err in finding that Costello failed to adduce the requisite proof of the contingent contract's relevance, we recognize that the fact that a contract contains contingencies does not *ipso facto* render the contract inadmissible to establish a property's fair market value. To the contrary, if a litigant establishes evidence to support a finding of a reasonable probability that the contingencies would be fulfilled but for the state's taking, then the contract's relevance and admissibility would be established. *See Lake County, Etc. v. Bank & Trust Co., Etc.,* 106 Ill. App.3d 856, 436 N.E.2d 237, 243, *cert. denied* 507 N.E.2d 1326 (1982) (landowner bears the burden of proving "a *probability* not a mere *possibility* of rezoning within the reasonably near future.")

Appendix A

In *State Roads Comm. v. Warriner*, 211 Md. 480, 484, 128 A.2d 248 (1957), we stated that "evidence of a reasonable probability of a change in zoning classification within a reasonable time may properly be admitted and its influence upon market value at the time of the taking may be taken into account."[3] *Accord, Burton v. State Roads Comm'n*, 251 Md. 403, 408, 247 A.2d 718 (1968), wherein we noted that in valuing property subject to condemnation proceedings, a jury should be allowed to consider a prospective zoning change only if there is a "*reasonable probability* of a change in zoning classification *within a reasonable time*," [emphasis in original] and cautioned that "consideration must [also] be given to its present zoning status." *See also Oak Brook Dist. v. Oak Brook Dev.*, 170 Ill. App.3d 221, 524 N.E.2d 213 (1988) (it is for the trial court to make the preliminary determination, as a matter of law, that there is sufficient evidence of a reasonable probability of rezoning to permit testimony as to market value based on such a probability); *IIT Realty Corp. v. State*, 120 A.D.2d 706, 502 N.Y.S.2d 504 (1986) (to demonstrate a reasonable probability that the zoning would be changed, a party must present more than a hypothetical possibility or mere speculation).

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3. We see no essential difference in the application of the doctrine of *Warriner* to zoning reclassification and its application to approval by a Planning Board of some modified plan in keeping with approved zoning restrictions. In both instances we are concerned with the use to which the subject property may be put and the reasonable probability of the proper authority approving a change in that use.

Thus, whether there is a likelihood that a zoning reclassification may in the near future be granted or that a condition precedent (specific design plan) to the development of land may be approved, the likelihood may be considered to have an effect on present market value if sufficiently likely to occur. Of course, if the likelihood is not likely, the trial judge will not abuse his discretion in denying admission of evidence bearing on this point.

Appendix A

For an example of evidence sufficient to meet the reasonable probability test, see *Warriner*, wherein we stated that:

> Without reviewing the testimony in detail, we think that the showing as to the growth in population of the Towson area, the marked expansion of its commercial area outwards along the York Road towards the Wolsh tract and the demand for property for industrial use in the Towson area, the proximity of a tract already zoned as light industrial, the adaptability of the tract to such use, two widenings of the York Road and the opening of a part of the Baltimore-Harrisburg Expressway in the vicinity, and the opinions of expert witnesses that the highest and best use of the Wolsh tract was for light industrial use, were sufficient to meet the test of at least a *reasonable probability of reclassification within a reasonable time*. (Emphasis added).

211 Md. at 486-87. Similarly, the Supreme Court of Delaware described such a scenario of reasonable probability of rezoning in *State v. Parcel No. 1 - 1.6401 Acres of Land, Etc.*, 243 A.2d 709, 712 (Del. 1968):

> The Owners adduced the testimony of an expert witness who stated that the highest and best use of the property was commercial or industrial; that a non-conforming commercial use of part of the property had been made for some time; that he had much experience, during 30 years as a real estate broker, in making applications to the Zoning Commission for the rezoning of similar properties

> from residential to commercial; that he did not know of one such application that had ever been disapproved. The witness concluded that, based upon his knowledge of the decisions of the Zoning Commission over the years regarding land such as is involved in the instant case, he had "no doubt at all but what [sic] it would be changed" from residential to commercial. Although there was evidence to the contrary, *such testimony was sufficient, in our view, to support a finding of reasonable probability of rezoning,* and thus was sufficient to warrant submission of the issue to the commission. [Emphasis added].

As we see it, if no reasonable probability of fulfillment within a reasonable time of a condition precedent to development appears from the evidence, a jury should not be allowed to base its valuation of the property upon a speculative and improbable contingency. A remote possibility of approval of a proposed use simply lacks the probative force necessary for relevance in determining a property's value.

In the case at bar, Costello's own witness admitted that the zoning did not permit building the commercial office facility contemplated under the contract. Further testimony indicated that it also would be unlikely for Costello or any successor to obtain approval of the specific design plan to build the anticipated project. Under these circumstances, we hold that the trial court properly excluded the contract as evidence of the property's value.

JUDGMENT OF COURT OF SPECIAL APPEALS AFFIRMED. PETITIONER TO PAY THE COSTS.

APPENDIX B — OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND FILED MAY 11, 1987

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1254

September Term, 1986

J. WILLIAM COSTELLO PROFIT SHARING TRUST

v.

STATE ROADS COMMISSION OF THE STATE HIGHWAY ADMINISTRATION

Moylan,
Alper,
Bell, Rosalyn B.,
JJ.

PER CURIAM

Filed: May 11, 1987

This is an appeal from a condemnation award. On May 16, 1985, the State Roads Commission of the State Highway Administration (the "State") filed a condemnation petition against the predeceseor to appellant, Robert D. Costello Associates, Inc.

Appendix B

Profit Sharing Trust ("Costello"),[1] in the Circuit Court for Prince George's County to condemn the property for the reconstruction of the Route 50/197 Interchange. The State deposited a check in the amount of thirty-four thousand eight hundred fifty and no/100 dollars ($34,850.00) with the court, claiming that that sum represented the fair market value of the condemned property.

In an answer filed on June 14, 1885, Costello admitted the necessity of the taking but alleged, *inter alia*, that the amount deposited with the court did not represent the fair market value of the property. The case was tried before a jury, the Honorable Albert T. Blackwell, Jr. presiding. At trial, two real estate appraisers testified on behalf of the State and one appraiser testified for Costello.

Mr. Melville Peters testified on behalf of the State that six comparable commercial properties in the area had been sold for $4.03 per square foot, or $76,232.00. Because he perceived numerous limitations on the commercial use of the condemned property, Peters appraised it to be worth $2.00 per square foot, or $36,116 for the property. Charles E. McLane, Sr., the State's second appraiser, valued the property at $35,000. based on sales of residential townhouses in the area.

Joseph William Costello testified on behalf of appellant. Through his testimony, appellant attempted to introduce a 1983 sales contract for the condemned property. The court refused to admit the terms of the agreement into evidence, however, because the contract was contingent and the options were never exercised.

---

1. By deed dated December 12, 1983, Robert D. Costello Associates, Inc. Profit Sharing Trust conveyed the property which is the subject of this suit to William Costello, M.D., P.A. Profit Sharing Trust.

Appendix B

Mr. Costello testified that in his opinion the property was worth $90,000 on the date of the taking.

The matter was submitted to the jury, which awarded Costello Forty-five Thousand Dollars and no/100 ($45,000.00) as compensation for the State's taking. Costello filed a timely appeal, and presents the following questions:

> 1. Did the court err in denying the admission of a binding contract of sale for the property as evidence of its fair market value?
>
> 2. Did the court err in denying the admission of the testimony of A. John Briscuso into evidence?
>
> 3. Did the State present any credible testimony on the fair market value of the property?
>
> 4. Did the court's instructions to the jury interfere with the responsibility of the jury to determine the credibility of the owner's testimony?
>
> 5. Did the court incorrectly instruct the jury as to the meaning of the District Council Resolution CR-108-1975?

I. Admission of the Contract

Appellant argues that the trial court erred in denying the admission of a binding contract of sale for the property as evidence of its fair market value. Appellee counters that the trial court did not err in refusing to admit the contract because it contained

so many conditions that it really was not akin to a binding contract but was more like an option contract.

The rule in Maryland is clear. "While the property owner has a right to voice his opinion of the market value of his property in a condemnation case, . . . an offer to purchase real property is not admissible to prove its value." *State Roads Commission v. Kuenne,* 240 Md. 232, 235 (1965). Offers are inadmissible to prove the value of a contract because "the value of an offer depends on too many considerations to allow it to be used as a test of the worth of property." *Horner v. Beasley,* 105 Md. 193, 197 (1907), quoted in *State Roads Commission v. Wyvill,* 244 Md. 163, 172 (1965). The same reasoning precludes the admissibility of option contracts. *See Wyvill,* 244 Md. at 178.

In *State Roads Commission v. Wyvill, supra,* the Court of Appeals considered the admissibility of unconsummated contracts of sale of properties comparable to the condemned real estate. Noting that, "[a] number of cases have held that the price fixed in an unconsummated contract of sale entered into before the condemnation by the owner of the condemned property with a third person is admissible as substantive evidence of the value of the property," *Id.* at 177, the court stated:

> The reasons for the admissibility of prior contracts made by the owner of the condemned property may well be applicable in considering the question of the admissibility of contracts of sale for comparable properties. The chances of fraud seem to be no greater; two strangers to the condemnation litigation are involved instead of one. It is true that as to a prior contract for the sale of the condemned land the owner is generally

> on the stand, subject to cross examination, but the way is always open to opposing counsel to attack the bona fides of contracts as to comparable lands. Modern pre-trial discovery procedure, properly used, affords opportunity for the investigation of any such contracts which will be offered in evidence. *Unlike offers and options, contracts for the purchase of land are binding obligations, not lightly ignored; the fact the contracts have not progressed into sales seems to go to the weight of the evidence rather than to its sufficiency.*

Id. at 176 (emphasis added). Accordingly, the court held that evidence of a contract on comparable property was admissible to test an expert's valuation on cross-examination. Moreover, once admitted on cross-examination, subsequent witnesses for the property owner can refer to the contract as the basis for their opinion. *Id.* at 171-80.

In *Wolff v. Commonwealth of Puerto Rico,* 341 F.2d 945 (1st Cir. 1965), a case the Maryland Court of Appeals cited with approval in *Wyvill*, the appellant property owner contended that the trial court erred when it excluded evidence that prior to the condemnation the property had been contracted to be sold at a high price conditioned upon obtaining a new zoning classification. The "Commonwealth" argued in opposition that the contingency on the contract rendered it an option and, therefore, inadmissible as proof of the property's value. The Circuit Court of Appeals ruled the contract admissible and explained:

> The Commonwealth's description of this transaction as "incontestably" an option is quite

> erroneous. *If the owners had succeeded in obtaining the change the buyer had no option, but stood committed.* The purchase and sale agreement was dated September 12, 1962 and the date for performance was April 12, 1963. The condemnation occurred February 11, 1963, voiding the agreement because, *inter alia,* as the Commonwealth's own witness testified, after a condemnation no reclassification will be made. Although voided, the agreement was admissible as some evidence of what the property would have been worth, had there been no taking, had a reclassification been obtained. *A sale conditioned on a reclassification is nonetheless a sale,* Commonwealth v. Ocean Park Development Corp., 1956, 79 P.R. 149, 163, *and the fact that it was not consummated cannot be an objection.* United States v. Certain Parcels of Land, 3 Cir., 1944, 144 F.2d 626, 155 A.L.R. 253. Of course if it should appear that it was a simulated agreement made in contemplation of condemnation for the purpose of providing evidence, that would be another matter. This, however, is something to be shown in rebuttal. United States v. Certain Parcels of Lane, supra.

Id. at 947 (emphasis added).

The facts of *Wolff* are, however, distinguishable from those of the case at bar. In *Wolff*, the property in question was classified as "M." The court noted that " 'M' means that no construction of buildings may be undertaken until application has been made to the Planning Board for permission, and a changed classification,

obtained. 'M' was not, however, a state classification . . . any piece of property which has been classified 'M' will be eventually changed to some other classification." *Id.* at 946. In holding in favor of the condemnee, the court explained that:

> [W]hen there is a possibility or probability that the zoning restriction may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value.

Id. at 946-7, quoting 4 Nichols on *Eminent Domain,* § 12.322 (3rd ed. 1985).

The probability, found in *Wolff*, that the zoning would be changed to the use proposed in the contract is not, however, present in the case *sub judice*. To the contrary, the appellant's own witness admitted that the zoning did not permit building a medical office complex. Further testimony indicated that it also would be unlikely for appellant or his successor to obtain the necessary zoning changes to build the anticipated project. In short, appellant put forth insufficient evidence to establish that the contingencies in the contract could be fulfilled. That evidence was necessary to make the contract a binding one. Accordingly, we hold that the trial court did not err in refusing to admit the contract as evidence of the property's value.[2] Without evidence tending to show that the contingencies could be fulfilled, the contract is little more than an offer to purchase — which is inadmissible

2. In so holding, we recognize that many contracts contain contingencies and the fact that a contract contains a contingency does not *ipso facto* make the contract inadmissible to prove the value of real property.

to prove the value of property. *Horner,* 105 Md. at 197.

II. Admission of Testimony of the Contract Purchaser

Appellant next contends that the court erred in excluding the testimony of A. John Briscuso, President of Woodbridge Construction Co. and contract purchaser of the condemned property. Specifically, appellant asserts that:

> The Court erred in concluding that there was not a valid Agreement for the sale and purchase of the Property subsequent to April 15, 1983 . . . . The Agreement was a valid contract; therefore, Briscuso, as the contract purchaser, should have been permitted by the Court to testify regarding the actions he had taken to obtain site plan approvals for the Property and to testify as to the fair market value of the Property on the date of the taking. *See Oxon Hill Recreation Club, Inc. v. Prince George's County,* 281 Md. 105, 375 A.2d 564 (1977).

In *Oxon Hill*, appellant argued that the court erred in excluding the testimony of the corporate president concerning certain costs incidental to the condemnation action. The Court of Appeals recognized that "an individual owner is competent to express his opinion of value although he has not qualified as an expert." *Id.* at 109. The court held, however, that "the same principle does not extend to an officer of a corporation unless he can be shown to have some special knowledge as to value." *Id.*

In the case *sub judice*, Mr. Briscuso was neither an individual owner of the site nor was he offered as an expert. Mr. Briscuso's

testimony was offered merely to bolster the credibility of the contract of sale as evidence of the condemned property's value. As we hold that it was not error to preclude the admission of the contract as evidence, it logically follows that the court did not err in precluding collateral testimony regarding the contract.

III. Evidence of Fair Market Value

Appellant's third contention is that the State presented no credible testimony concerning the fair market value of the property. This argument appears for the first time on appeal. Appellant made no objections or motions to strike the testimony of the State's expert witness below. Nor did appellant make any similar motions at the close of appellee's case or at the end of the trial. Accordingly, we hold that this issue has not been preserved for our review. Md. Rule 1085.

IV. Instructions as to Opinion Evidence

Appellant next argues that the court's instructions to the jury interfered with the jury's responsibility to determine the credibility of the owner's testimony. Specifically, appellant objects to the court's instruction that, "if you think [the testimony of the owner] is so biased or prejudiced as to not have any value to you, you disregard it in arriving at your conclusion." Appellant asserts that this statement regarding the owner's "bias or prejudice" was prejudicial to appellant. We disagree. The instruction taken as

a whole[3] puts no more emphasis on the owner's opinion than

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3. The instruction was as follows:

> In weighing the opinions of experts you should consider his experience, training, skills and knowledge of the subject matter about which he or she is expressing an opinion. We have some very good lady appraisers in the County. One wasn't called in this case. I always include he or she in the appraiser category. You should give the expert testimony the weight and value that you ladies and gentlemen think it should have. You are not bound to accept it, or required to accept it. If you feel it doesn't have weight or credibility or if it doesn't assist you in arriving at your conclusions.
>
> And finally, you should consider the experts' opinions along with any other or all of the evidence in the case. You don't treat an expert's opinion in a vacuum. You put it in a proper setting and that is that it was an opinion and it is of some help to us or it is no help and so we use it.
>
> Another exception in a condemnation case to the general rule that a person or a witness is not permitted to give an opinion is the property owner, himself, and the law concludes that a property owner, because he is uniquely associated with or has knowledge about the property is allowed, also, to express an opinion in this case as to the value of the property. You have heard the owner, or the practical owner, Dr. Costello, who is the trustee of a trust fund but who, in effect, is the general recipient or owner of the trust fund, express his opinion as to the value of the property and you put that, also, in its proper perspective. It has no more weight or credibility that any of the other witnesses that has (*sic* have) been presented to you and you judge it as you do any other witness's testimony. If it has weight and credibility, you give it what ever value you think it is entitled to receive. If you think it is so biased or prejudiced as to not have any value

(Cont'd)

it does on the experts' opinion. Although the instruction did point out that the owner *may* be biased in his assessment, it did not invade the jury's province of judging the weight and credibility of each witness's testimony. *See Baltimore City v. Schreiber*, 243 Md. 546, 553 (1966). Accordingly, we hold that the instruction, taken as a whole, was not unduly prejudicial to appellant, but reasonably raised the question of owner bias as a jury consideration.

V. District Council Resolution CR-108-1975

Appellant's final assertion is that the court incorrectly instructed the jury as to the meaning of District Council Resolution CR-108-1975. The court's instruction was, in pertinent part, as follows:

> RU, you have heard much testimony about, and you will have exhibits which restate what the RU zoning category would allow. On this particular property, because it fell within the City of Bowie, the RU, and because of other considerations presented to the County at the time of the adoption of the sectional map amendment, the RU category was expanded to some extent for this property, and that was specifically addressed in what is called CR-1081975, which is a resolution passed by the Prince George's County

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(Cont'd)

> to you, you disregard it in arriving at your conclusion. But the owner's opinion, because of the unique association may have some help to a jury in deciding a valuation and, if it does, you are entitled to use it, part of it, or none of it.

Appendix B

Government, by the County Council, sitting as the District Council, and they sit as the District Council to address the formal zoning matters. And at that time with reference to this property, they said it fell within the permitted use of RU, and in addition, the basic plan, as amended, stated that the land use types are in accordance with the RU, with this exception, two exceptions: (1) that hospitals and care homes will not be permitted on this property, but (2), and more importantly, medical and other professional offices. But professional offices will be permitted only as a part of the convenient commercial space. A little bit technical, but counsel will be arguing this. But one of the permitted uses was under the RU is a convenient commercial space. A convenience store, and they expanded somewhat in this specific case, Dr. Costello's property, to permit professional offices being permitted only as a part of the convenience commercial space. That implies that if there is a 7-Eleven store there, they would also allow an adjunct or another store beside it, or another office space for professional use, a doctor, or a dentist, or an attorney, or barber shop, or a hair salon. It was something that they saw in their wisdom that might be a practical use, and they allowed it, and for your purposes it is a permitted use. And if you conclude that the highest and best use for this property is, as the expert opinions have been, that its highest and best use was for a professional office or a convenience store, than you would consider that in arriving at your evaluation.

Appendix B

After the judge gave his instructions, the appellant made, *inter alia*, the following exception:

> MR. FREISHTAT: Second is your comment to the jury regarding the office could have a convenience commercial —
>
> THE COURT: Isn't that what it says? Special office will be permitted only as part of the convenient commercial space.
>
> MR. FREISHTAT: I except to that.

Maryland Rule 2-520(e) requires a party to object "promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." In the case *sub judice*, although appellant stated the matter to which he objected, the grounds for those objections were never articulated. Appellant's arguments appear for the first time on appeal. Accordingly, we hold that this issue was not properly preserved for our review. Md. Rule 2-520(e).

JUDGMENT AFFIRMED;
APPELLANT TO PAY THE COSTS.

APPENDIX C — LETTER FROM MARYLAND DEPARTMENT OF TRANSPORTATION TO JACK BLEVINS DATED JULY 28, 1983

MARYLAND DEPARTMENT OF TRANSPORTATION
State Highway Administration

Lowell K. Bridwell
Secretary

M. S. Caltrider
Administrator

July 28, 1983

Mr. Jack Blevins
Urban Design Division
Maryland National Capital
Park & Planning Commission
County Administration Bldg.
Upper Marlboro, Md. 20870

Re: Prince George's County
Route 197 @ Route 50
Princeton Square
SDP-8305

Dear Mr. Blevins:

This specific design plan shows a commercial building within our proposed right-of-way for the reconstruction of the Route 50/197 Interchange. This construction project is included in our current Consolidated Transportation Program (1983-88) for right-of-way acquisition beginning Fiscal 1986 and construction funding in Fiscal 1988.

Appendix C

The S.H.A. is therefore requesting that this specific design plan not be approved and that no building permits be allowed to be issued within this future right-of-way.

Your efforts in this regard will be appreciated.

Very truly yours,

s/ Charles Lee
Charles Lee, Chief
Bureau of Engineering
Access Permits

By: Charles Rose

CL:CR:vrd

cc: Mr. E. H. Meehan
Mr. L. Wilkinson
Mr. R. Ford

My telephone number is (301) 659-1350